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THE FCC'S NEW NETWORK SEMI-NEUTRALITY ORDER MAINTAINS INCONSISTENCY IN THE BROADBAND WORLD

Kendra Leghart*

On December 23, 2010, the Federal Communications Commission ("FCC") issued a new Internet Order designed to regulate broadband access providers to further the principle of network-neutrality. The Order imposes regulations on broadband access providers for the first time, seeking to maintain the free and open character of the Internet by preventing this relatively new class of Internet Service Provider ("ISP") from discriminating in the type of content that travels over its network. The Order divides broadband access providers into two categories, fixed and mobile, imposing fewer restrictions on the latter. The rules impose transparency requirements for both, but prohibit only fixed broadband providers from discriminating or blocking any legal content. The disparity of regulation between these two creates a sort of network semi-neutrality rather than a true neutrality in the broadband access market. This article posits that the FCC has not gone far enough in its Order and defends the rules against challenges to the Commission's authority and its decision to regulate the broadband access market.

I. INTRODUCTION

The Internet has changed drastically since the general public first gained access to the World Wide Web in 1991.[1] At the time,

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[1] *See* Net Indus., *The Internet and the Electronic Age—The History of the Internet,* LIBRARY INDEX, http://www.libraryindex.com/pages/1438/Internet-Electronic-Age-HISTORY-INTERNET.html (last visited Mar. 15, 2011). Tim Berners-Lee introduced the Web browser, which "allowed a user to jump from one server computer on the Internet to another." *Id.* He also introduced "hypertext markup language (HTML), which was a programming language for creating Web pages . . . [and] hypertext transfer protocol (HTTP), a command used by the browser to retrieve the HTML information contained on a server's

access to the Internet was provided via dial-up,[2] a type of Internet connectivity that uses a standard copper phone line.[3] Today, the public is increasingly turning to faster broadband connections, which provide speeds roughly 30 times faster than dial-up,[4] allowing users to watch a full-length movie while instant messaging a friend with just the click of a mouse. The Federal Communications Commission ("FCC"), along with other groups, both public and private, has speculated that the "freedom" and "openness" that is so characteristic of the Internet could be in jeopardy.[5] Internet Service Providers ("ISPs") have the ability to control the traffic that is sent and received over their network. While dial-up is covered by common carriage rules under the Communications Act of 1934,[6] broadband access providers have not been characterized as "wire" or "radio" under the Act and have

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Web site," allowing the general public access to the World Wide Web for the first time. *Id. See also* TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF THE INFORMATION EMPIRE 12 (Alfred A. Knopf, ed. 2010) ("[T]he 1990s would also see the so-called Internet revolution, though amid its explosive growth no one could see where the wildly open new medium would lead.").

[2] Dial-up refers to "a type of Internet connectivity that operates through a standard telephone line." R. Kayne, *What is Dial-Up Internet Access?*, WISE GEEK, http://www.wisegeek.com/what-is-dial-up-internet-access.htm (last updated Mar. 5, 2011).

[3] Jason Oxman, *FCC and Un-Regulation of the Internet* 21 (FCC, Working Paper No. 31, 1999), *available at* http://www.fcc.gov/Bureaus/OP/working_papers/oppwp31.PDF.

[4] Web Exordium, LLC, *How Fast is Dial Up?: Explanation of Why Dial Up Speed is Limited to (Less Than) 56K*, HIGH SPEED INTERNET, http://www.high-speed-internet-access-guide.com/dialup/how-fast-is-dial-up.html (last visited Feb. 28, 2011). Most DSL and Cable providers claim their services are 70 or 140 times faster; however, as of December 2008, a typical 1.5 Mbps DSL connection would be about 30 times faster than 56 Kbps dial up. *Id.*

[5] *See generally Act Now to Save Net Neutrality*, FREE PRESS, http://www.savetheinternet.com (last visited Feb. 28, 2011) (citing comments of Vinton Cerf, Google, Tim Berners-Lee, Steve Wozniak, Microsoft, Yahoo!, eBay, and Amazon, among other notable individuals and organizations, in support of network-neutrality).

[6] Communications Act of 1934, Pub. L. No. 416, ch. 652, 48 Stat. 1064 (1934) *amended by* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C. (2006)).

thus gone unrestricted.[7]

Many of these broadband providers offer their own products and services which compete with the third party companies that use their broadband networks to gain access to end consumers of these products and services. In an effort to protect the free and open character of the Internet by ensuring that these broadband access providers cannot discriminate in the content of what is transmitted over their networks, the FCC has taken several actions, the most recent of which is the Open Internet Order ("Order") issued on December 23, 2010.[8] The FCC claims that the Order furthers a policy of network neutrality[9] that will preserve the Internet as "an open network, enabling consumer choice, freedom of expression, user control, competition, and the freedom to innovate."[10] The Order is highly political and highly controversial, mainly as a result of the same disagreements that surround the network-neutrality debate. The debate centers on two issues: first, whether the FCC has Congressional authority under the Communications Act of 1934 as amended by the Telecommunications Act of 1996 to push its network neutrality policies through the regulation of broadband access providers, since the Act does not define "broadband"; and second, whether such regulation is needed or in fact will preserve the free and open nature of the Internet that has developed from the Internet's open

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[7] *See* 47 U.S.C. § 151 (2006) ("For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, . . . a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, . . . there is hereby created a commission to be known as the 'Federal Communications Commission,'. . . .").

[8] *In re* Preserving the Open Internet, Broadband Industry Practices, Report and Order, 25 FCC Rcd. 17,905, 17,906 (Dec. 21, 2010) [hereinafter Open Internet Report and Order].

[9] "Network neutrality" and "net neutrality" refer to the same principle and will be used interchangeably in this paper.

[10] Press Release, Fed. Commc'ns Comm'n, FCC Acts to Preserve Internet Freedom and Openness: Action Helps Ensure Robust Internet for Consumers, Innovation, Investment, Economic Prosperity (Dec. 21, 2010) (on file with North Carolina Journal of Law & Technology), *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2010/ db1221/DOC-303745A1.pdf [hereinafter *FCC News Release*].

architecture.[11]

Network neutrality is a network design principle that purports the idea that there should not be any discrimination by Internet service providers in the content, applications, or services that travel over the network.[12] However, the Order has divided broadband access providers into fixed and mobile broadband, holding only the former to the anti-blocking and anti-discrimination rules. The Order is thus more similar to a policy of "network semi-neutrality" than the more hard-lined network neutrality originally

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[11] Whether the FCC has authority to regulate broadband ISPs is troubled by the language of the Communications Act of 1934 as amended by Telecommunications Act of 1996 because it does not define cable broadband. Courts have classified cable broadband as "cable service," "telecommunications service," or neither under the Act. *See* MediaOne Grp., Inc. v. Cnty. of Henrico, 97 F. Supp. 2d 712, 715 (E.D. Va. 2000) (classifying cable broadband as "cable service"); AT&T Corp. v. City of Portland, 216 F.3d 871, 871 (9th Cir. 2000) (classifying cable broadband as "telecommunications service"); Gulf Power Co. v. FCC, 208 F.3d 1263, 1278 (11th Cir. 2000) (classifying cable broadband as neither). "Basic telecommunications services fall under Title II of [the Act] . . . and are subject to common carrier regulations and obligations." Robert Cannon, *Where Internet Service Providers and Telephone Companies Compete: A Guide to The Computer Inquiries, Enhanced Service Providers and Information Service Providers*, 9 COMMLAW CONSPECTUS 49, 50 (2001). The FCC has in the past tried to rely on an "ancillary jurisdiction" under Title I of the Act, but this was struck down in *Comcast Corp. v. FCC*. *See* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010). Whether such regulations are needed is more of a policy debate focusing on the Internet's open architecture and the free market that created the "free" and "open" character which proponents of network neutrality claim are at stake. *Id.*

[12] *See* Jeff Turner, *Net Neutrality Debate*, RUNTOGOLD.COM (Feb. 17, 2010), http://www.runtogold.com/2010/02/define-fcc-net-neutrality-legislation-debate/; *see also* Jonathan E. Nuechterlein, *Antitrust Oversight of an Antitrust Dispute: An Institutional Perspective on the Net Neutrality Debate*, 7 J. Telecomm. & High Tech. L. 19, 20 (2009) ("[A]t the highest level of generality, the term describes two distinct types of proposed regulation of broadband Internet access providers . . . . [One] would draw and enforce a line between acceptable network management practices and unacceptable 'blocking' or 'degradation' of disfavored Internet applications and content . . . . [The other] would ban a broadband Internet access provider from reaching commercial agreements with particular applications and content providers to provide the sophisticated performance-enhancement techniques needed . . . .").

advocated by FCC Chairman Julius Genachowski.[13]

The Order takes aim at broadband access providers by imposing three rules requiring transparency in the form of public disclosure and prohibiting blocking and unreasonable discrimination in the transfer of any legal content.[14] While these rules are designed to create a level playing field, they exempt mobile broadband providers from the two rules prohibiting discrimination of transfer rate[15] and blocking. The result is that the Order has only partially addressed the issues it was intended to remedy and therefore the mobile broadband industry will develop as a separate unregulated niche, making it harder to acclimate to the FCC's proposed future regulations. Furthermore, the examples of discrimination that the Commission has cited as evidence of the need for this Order have generally been acts by mobile broadband access providers.[16]

This article examines the Order against the backdrop of the network neutrality debate that has existed for the past decade. Part

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[13] *See Net Neutrality*, NEW YORK TIMES, Dec. 22, 2010, http://topics.nytimes.com/topics/reference/timestopics/subjects/n/net_neutrality/index.html ("The FCC compromise followed a proposal made in August by Google and Verizon, which called on regulators to enforce net neutrality on wired connections but not on wireless Internet.").

[14] *FCC News Release*, *supra* note 10.

[15] *See generally* Admin, *Net Neutrality for Costa Rica—Throttling Bandwidth Usages and Charging for It,* TICO TIMES DIRECTORY BLOG (April 9, 2010), ticotimes.com/costa-rica/net-neutrality-throttling-bandwidth-usage (defining the bandwidth, also known as transfer rate, as the speed at which data is transferred to a user's computer). It is measured in bits per second (bps) and the rate is determined by the bandwidth of the connection. *Id.* ISPs control this bandwidth, and a concern is that these companies will begin "throttling" certain types of downloads like BitTorrents, which require more bandwidth and cost the ISP more to transfer. *Id.* By "throttling," an ISP can essentially put a speed limit on how fast a user can download or view files which in turn will save the ISP money and prevent the network from crashing. *Id.* Comcast was found to have been throttling BitTorrents, in particular voice-over Internet protocols (VoIPs). *Id.*; *see also Comcast*, 600 F.3d at 661 (holding that the FCC was denied the authority to regulate this practice by a D.C. Circuit Court in April of 2010).

[16] *In re* Preserving the Open Internet, Broadband Industry Practices, Notice of Proposed Rulemaking, 15 FCC Rcd. 13,064, 13,083 (Oct. 22, 2009) [hereinafter Notice of Proposed Rulemaking].

II will briefly outline the main arguments surrounding the network neutrality debate and the FCC's views in regards to this philosophy. Part III will discuss the FCC's authority to engage in the regulation of broadband providers by looking at the Communications Act of 1934, as amended by the Telecommunications Act of 1996. Part IV will explore the three new rules put forth in the Order and their expected impact on individual users and broadband providers, as well as on the overall "neutrality" of the Internet. Part V will look at the implementation of the Order, as well as current and expected challenges to Congressional approval. This article posits that while it is a viable part of the solution to the network neutrality debate, the Order will not be effective because of the exclusion of the mobile broadband network from the second rule prohibiting blocking and the third rule prohibiting unreasonable discrimination in transfer rate, in addition to the lack of strong Congressional support for expanding FCC authority to broadband ISPs.

II. NETWORK NEUTRALITY

A. *Sources of Network Neutrality Principle*

The philosophy behind the network neutrality principle goes back to the development of the Internet, though the term did not come into use until about 2005.[17] Network neutrality is the application of common carriage[18] principles to the Internet.[19] Tim

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[17] Wu, THE MASTER SWITCH, *supra* note 1, at 201–02 ("While [the Internet's] design [as an organic, decentralized network] had been born of necessity, through the 1970s and early 1980s the Internet's developers began to see a virtue in it.").

[18] Common carriage was a common law principle that required common carriers to offer their services to the public generally rather than to a specific group. *See* Richard S. Whitt, *Evolving Broadband Policy: Taking Adaptive Stances to Foster Optimal Internet Platforms*, 17 COMMLAW CONSPECTUS 417, 472 (2009). The Communications Act of 1934 applied this principle to common carriers by wire or radio, such as telephone companies. *See* 47 U.S.C. § 153(h) (2006) ("'[C]ommon carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this act; but a person engaged in radio

Wu,[20] who is credited with coining the term,[21] has described network neutrality as the idea that the network should "treat[] all [that] it carries equally, indifferent to the nature of the content or the identity of the user."[22] The basic premise behind this idea is that "information networks are often more valuable when they are less specialized."[23] The "founding principles of the Internet" include the ideas articulated in 1984 by David Reed, David Clark, and Jerome Saltzer, three professors of computer science, who argued for a decentralized system design for the Internet that would give the end user,[24] rather than the provider, the discretion to choose the content, keeping the network itself as non-specialized as possible.[25]

The current state of the network neutrality debate is a reflection

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broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.").

[19] *See* Wu, THE MASTER SWITCH, *supra* note 1, at 311.

[20] Tim Wu is a professor of law at Columbia University and was most recently appointed senior policy advisor of the Federal Trade Commission. *See* Ben Kerschberg, *Net Neutrality Star Tim Wu Joins Federal Trade Commission as Senior Policy Advisor*, FORBES LAW & TECHNOLOGY BLOGS, (Feb. 10, 2011, 9:14 AM), http://blogs.forbes.com/benkerschberg/2011/02/10/net-neutrality-star-tim-wu-joins-federal-trade-commission-as-senior-policy-advisor/.

[21] *Id.*

[22] Wu, THE MASTER SWITCH, *supra* note 1, at n. 202.

[23] Tim Wu, *Network Neutrality FAQ*, http://www.timwu.org/network_neutrality.html (last visited Mar. 17, 2011).

[24] "End user," which will be used interchangeably with "user" or "consumer," refers to the individual user or consumer who accesses the Internet via a broadband connection. "Edge user," which will be synonymous with "edge-provider" in this paper, will refer to providers of content, applications, services and devices which can be accessed over broadband Internet access services. "In the Internet's early years, the stereotypical "edge" provider was an entrepreneur who ran a start-up website from a server in his garage. Today, the most prominent "edge" networks feature enormous "server farms" and cashing facilities built by companies as diverse as service providers Akamai and Level 3, on-line retailers Amazon.com and eBay, and Internet superpower Google." Nuechterlein, *supra* note 12, at 23.

[25] *See* Wu, THE MASTER SWITCH, *supra* note 1, at 202 (discussing Reed, Clark and Saltzer's 1984 paper "End-to-End Arguments in System Design" which announced the innovative end-to-end principle); *see generally* J.H. Saltzer, D.P. Reed, & D.D. Clark, *End-to-End Arguments in System Design*, ACM TRANSACTIONS ON COMPUTER SYSTEMS (TOCS), (Nov. 1984) at 277–88.

of the progressive development of Internet access, from dial-up to broadband. The birth of "dial-up" in the mid-1980s allowed end users to connect to the World Wide Web using telephone companies' phone lines. These telephone companies were required to comply with the FCC's Computer Inquiry Regulations,[26] which required them to provide the same transmission capabilities to third-party ISPs as they provided to their own services—essentially a rule of common carrier equality.[27] As cable companies began replacing dial-up with broadband[28] in the late 1990s, the reliance on equal transmission requirements for telephone companies (common carriage requirements) was lost, since the Computer Inquiry Regulations did not apply to the cable companies' broadband technology.[29]

Today, these telephone and cable companies, such as Comcast and Time Warner, comprise nineteen of the largest providers of broadband access in the United States, serving approximately 73.5

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[26] There are three Computer Inquiry Regulations, which operate to maintain a level playing field between telephone companies and ISPs. *See* Cybertelecom, *Computer Inquiries: Internet over Telecom*, CYBERTELECOM (Jan. 22, 2011), http://www.cybertelecom.org/ci/. Through these Regulations, the FCC has been able to regulate basic services, which include the computers that facilitate telecommunications, but not enhanced services such as ISPs, because the enhanced services market, the FCC has claimed, was highly competitive and innovative, and was also dependent upon basic service to operate and thus did not need regulation. *See id.*; Cannon, *supra* note 11, at 50.

[27] Cannon, *supra* note 11, at 66 ("One of the essential characteristics of being a common carrier is that the carrier must provide services to all end users on the same terms and conditions . . . .").

[28] The FCC has defined the term "broadband" as "having the capability of supporting, in both the provider-to-consumer (downstream) and the consumer-to-provider (upstream) directions, a speed (in technical terms, "bandwidth") in excess of 200 kilobits per second (kbps) in the last mile." *In re* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 14 F.C.C.R. 2398, 2406 (1999) [hereinafter 1999 Inquiry Concerning Deployment of Advanced Telecommunications]. By comparison, dial-up typically travels at 56 Kbps. *See id.* Other groups have set threshold transfer rates. *E.g., In re* America Online, Inc. & Time Warner Inc., 131 F.T.C. 829, 842 (2001) (setting the broadband threshold at 128 Kbps).

[29] *See, e.g.,* Nuechterlien, *supra* note 12, at 24–25.

million subscribers, or about 93% of all broadband users.[30] These companies act as broadband providers, affording access to online content, applications, and services—all of which are increasingly in competition with their own products and services. For example, Voice-over Internet Protocol ("VoIP") services are "increasingly being used as a substitute for traditional telephone service[s]."[31] Many broadband providers are deeply entrenched providers of traditional telephone services. This incentivizes companies that offer broadband access as well as traditional telephone services to block or slow the transmission rate of edge-providers[32] such as Skype.[33]

Video streaming is another area that may give broadband providers incentive to compete through discrimination and blocking. Online videos have been steadily rising in popularity.[34]

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[30] Press Release, Leitchman Research Grp., Under 350,000 Add Broadband in the Second Quarter of 2010, (Aug. 11, 2010), http://www.leichtmanresearch.com/press/081110release.html.

[31] Open Internet Report and Order, *supra* note 8, at ¶ 22 (*citing Tel. Number Requirements for IP-Enabled Servs. Providers*, Report and Order, Declaratory Ruling, Order on Remand, and RPRM, 22 F.C.C. Rcd. 19531, 19547 ¶ 28 (2007)).

[32] "In the Internet's early years, the stereotypical 'edge' provider was an entrepreneur who ran a start-up website from a server in his garage. Today, the most prominent 'edge' networks feature enormous 'server farms' and caching facilities built by companies as diverse as service providers Akamai and Level 3, on-line retailers Amazon.com and eBay, and Internet superpower Google." Nuechterlein, *supra* note 12, at 23.

[33] "Skype . . . is a software application [which] allows users to make voice [and video] calls over the Internet. Calls to other users within the Skype service are free, while calls to both traditional landline[] phones and mobile phone[s] can be made for a fee using a debit[] user account system." *Skype*, WIKIPEDIA (Jan. 20, 2011), http://en.wikipedia.org/wiki/Skype.

[34] S*ee, e.g.,* John Dodge, *Making Streaming Videos Mainstream*, CISCO (Nov. 29, 2010), http://newsroom.cisco.com/dlls/2010/ts_112910d.html (discussing rising popularity of streaming videos and sports and the future of the market as Google sets to launch Boxee, a search engine for TV and companies such as Sony, LG, and others are building Internet connectivity into their TVs); Matthew Shaer, *Wi-Fi, Hulu, DVR, and the end of the tube as we know it*, THE CHRISTIAN SCIENCE MONITOR (Oct. 27, 2010), http://www.csmonitor.com/The-Culture/TV/2010/1027/Wi-Fi-Hulu-DVR-and-the-end-of-the-tube-as-we-know-it (discussing trends of Americans towards on-line streaming of television shows

Hulu, YouTube, and Netflix are just a few of the companies that offer users the ability to watch television shows or movies via the Internet. Broadband providers, many of which are cable companies that market television shows and movies,[35] are in competition with these third party companies for subscribers. This competition creates an incentive for broadband providers to restrict or inhibit the transfer of competing third party services via their system. Not only do the majority of, if not all, broadband providers have economic and competitive incentives to discriminate, but they also have the ability to act on these incentives by slowing the transfer rate of or blocking certain content, applications, and services.[36]

However, evidence of such discrimination in practice is slight. In support of its belief that the above discriminatory acts are not mere future possibilities, the Commission cites a 2005 investigation into Madison River Communications, LLC, a subsidiary of a telephone company that they alleged had blocked Internet ports used for competitive VoIP applications.[37] The FCC also noted a 2008 discovery that Comcast had "disrupted certain peer-to-peer (P2P) uploads of its subscribers, without a reasonable network management justification and without disclosing its actions."[38] Without reference to any other specific instances, the Order notes that many broadband providers' terms of service "commonly reserve to the provider sweeping rights to block, degrade, or favor traffic" as evidence that these broadband access providers intend to engage in such discrimination.[39]

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and movies).

[35] It is important to note that these shows and movies are offered legally by cable companies.

[36] *See e.g.,* Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

[37] Open Internet Report and Order, *supra* note 8, at ¶ 35 (discussing *Madison River Communications, LLC and affiliated companies*, File No. EB -05 IH 0110, (where the subsidiary company paid $15,000 to settle the FCC investigation)).

[38] *Id.* However, it is important to note that the court in *Comcast v. FCC*, held that the FCC did not have the authority to regulate Comcast in this way. *Comcast*, 600 F.3d at 644.

[39] Open Internet Report and Order, *supra* note 8, at ¶ 36; *see also* Notice of Proposed Rulemaking, *supra* note 16, at ¶ 35. The Notice of Proposed Rulemaking acknowledges that "[t]hese dangers to Internet openness are not

B. *Arguments in Support of Network Neutrality*

Proponents of network neutrality argue that ISPs may be tempted to favor their own content over third parties due to same market competition and an increase in network traffic.[40] Concerns about maintaining the open nature of the Internet are based on the ability and mounting incentive of broadband Internet access providers to act as "Internet gatekeepers," deciding which Web sites can be loaded and at what speed.[41]

Tim Wu has likened network neutrality to the idea of a neutral electric grid that has the ability to support any appliance.[42] Wu

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speculative or merely theoretical. Conduct of this type has already come before the Commission in enforcement proceedings." It cites the 2005 Madison River and 2008 Comcast instances and goes on to note that "[c]omparable practices have been observed in the provision of mobile broadband services" and also notes that "[t]here have been additional allegations of blocking, slowing, or degrading P2P traffic . . . [though the Commission declined] to determine in this Order whether any of these practices violated open Internet principles." SavetheInternet.com also exposes statements of certain network owners' intentions to create a tiered Internet, as well as examples of various broadband providers discriminating their own favor. *See FAQ*, SAVE THE INTERNET (Jan. 20, 2011), http://www.savetheinternet.com/frequently-asked-questions (citing statements from Ben Scott, Mark Cooper); Jeannine Kenney, *Why Consumer Demand Internet Freedom: Network Neutrality: Fact v. Fiction*, FREE PRESS (May 2006) *available at* http://www.freepress.net/files/nn_fact_v_fiction_final.pdf (including statements of AT&T CEO Edward Whitacre: "[t]he Internet can't be free . . . because we and the cable companies have made an investment and for Google or Yahoo! or Vonage or anybody to expect to use these pipes free is nuts!").

[40] *See* Dan G. Barry, *The Effect of Video Franchising Reform on Net Neutrality: Does the Beginning of IP Convergence Mean that It Is Time For Net Neutrality Regulation*, 24 SANTA CLARA COMPUTER & HIGH TECH. L. J. 421, 422 (2008) (discussing the increase of phone companies such as AT&T and Verizon "enter[ing] the television market by allowing statewide video franchising" and how "[p]hone companies plan to take advantage of their growing fiber-optic networks to offer the 'triple play' service of voice, video and data services all over Internet protocol . . . in order to compete with cable companies.").

[41] Speed refers to the transfer rate, which ISPs are able to control. A major concern of network neutrality proponents is that broadband service providers will discriminate against P2P or competitive products and services by slowing down their transfer speed.

[42] Wu, *Network Neutrality FAQ*, *supra* note 23.

contends that it is this characteristic of the electric grid that has ensured its survival, as well as "supported giant waves of innovation in the appliance market."[43] He argues that the Internet, in the same way, must be able to support and carry all types of content, sites, and platforms equally.[44]

Proponents of this neutrality principle advocate for either one or both of two general types of regulation for broadband Internet access providers. First, that regulators should "draw and enforce a line between acceptable network management practices and unacceptable 'blocking' or 'degradation' of disfavored Internet applications and content."[45] Second, that regulators should "ban a broadband . . . provider from reaching commercial agreements with particular applications and content providers."[46] These network neutrality-based regulations operate on the theory that a network should carry every form of information and support every kind of application in the same way without discrimination,[47] thereby imposing no restrictions on end users' or edge users'[48] access to network participation on the Internet.[49] This unfettered access for the user is a reflection of the desire for consumer protection; allowing open access to all legal content; and to promote technological competition and innovation.

Support for network neutrality comes from all backgrounds. In the past four or five years, legal, economic, and technology scholars from a range of philosophical and political schools of thought have advocated for network neutrality.[50]

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[43] *Id.*

[44] *Id.*

[45] Nuechterlein, *supra* note 12, at 20.

[46] *Id.* (noting that the meaning of "network-neutrality" varies depending on the source, but that overall it is indicative of these two main regulatory style rules).

[47] Wu, *Network Neutrality FAQ*, *supra* note 23.

[48] "Edge users" refers to providers of content, applications, services and devices which can be accessed over broadband Internet access services. *See supra* note 24.

[49] *See* Open Internet Report and Order, *supra* note 8, *passim*.

[50] Such as President Barack Obama, Senator Al Franken, Time Berners-Lee (invented the World Wide Web), Vinton Cerf ("father of the Internet), Lawrence Lessig (concept of "free culture"), and Steve Wozniak (co-founded Apple

SaveTheInternet.com is a coalition group of supporters which includes non-profit organizations such as the American Civil Liberties Union (ACLU), Christian Coalition of America, and Democracy in Action.[51]

C. *The Debate*

Julius Genachowski, Chairman of the FCC, takes threats to network neutrality very seriously and has advocated a pro-network neutrality system since joining the Commission. However, the other four commissioners do not necessarily agree with Genachowski.[52] Beyond the FCC, the network neutrality debate has become a partisan one, with Democrats for and Republicans against.[53]

House Republicans voted on February 10, 2011 to withhold funds from the Commission to hinder them from carrying out the net neutrality regulations put forth in the new Order.[54] A second

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Computer Inc.). *See FAQ*, SAVE THE INTERNET, *supra* note 39.

[51] *About*, SAVE THE INTERNET (Jan. 20, 2011), http://www.savetheinternet.com/about. There is even a twitter account named @NetNeutrality that updates its followers on happenings related to the network neutrality debate. *#NetNeutrality*, TWITTER (Jan. 20, 2011), http://twitter.com/netneutrality#.

[52] *See* Dissenting Statement of Commissioner Meredith Atwell Baker, (Dec. 23, 2010) [hereinafter Baker Dissent]; Dissenting Statement of Commissioner Robert M. McDowell [hereinafter McDowell Dissent].

[53] Both of the Republican Commissioners, Baker and McDowell, voted against the Order. *See* Open Internet Report and Order, *supra* note 8. *See also Reaction to FCC's Network Neutrality*, BENTON FOUNDATION, http://benton.org/node/46945 (last visited Jan. 20, 2011) (noting that House Republicans "[have promised] a swift reaction . . . that could get off the ground as soon as January" and comments by Rep. Upton who charged that "Congress must use every resource available to halt the regulations." (internal quotation marks omitted)).

[54] Cecilia Kang, *House Votes to Stop FCC Funding for Net Neutrality*, WASHINGTON POST (Feb. 17, 2011), http://voices.washingtonpost.com/posttech/2011/02/house_votes_to_stop_funds_for.html?wpisrc=nl_wonk. Rep. Greg Walden (R-Ore.), who introduced the amendment, was quoted as saying: "We all want an open and thriving Internet. That Internet exists today. Consumers can access anything they want with the click of a mouse thanks to our historical hands-off approach . . . I am pleased that my colleagues in the House accepted my amendment to ensure the FCC does not have the funds to implement the controversial Internet regulations." *Id.* To pass, this amendment and a similar

amendment has been proposed by Senate Republicans[55] as part of a two-prong attack by the Senate and House on the FCC's Order.[56] Both of these attacks focus on the lack of any need for the regulations, citing that the government's "historical hands-off approach" has resulted in the open and thriving Internet that exists today.[57]

Tim Wu has found the divide in the network neutrality debate to be between "openists" and "deregulationists."[58] Openists focus on the ability of broadband ISPs to act as gatekeepers, creating tiered networks[59] and discriminating against competitors by slowing or blocking the transfer of their content. These proponents of network neutrality believe that without some regulation, "large companies can carve up the Internet into fast and slow lanes, charging a toll for content and blocking innovators from entering the information superhighway."[60] Deregulationists claim that government action is unnecessary and will in fact create unnecessary problems in the form of added administrative costs

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amendment put forth in the Senate would need to pass both chambers and not be vetoed by President Obama, who has advocated pro-network neutrality principles and is a supporter of the Save The Internet Coalition.

[55] Senators Kay Bailey Hutchinson (R-Tex.), Mitch McConnell (R-Ky.), and John Ensign (R-Nev.) introduced an amendment similar to Rep. Greg Walden's on February 16th to block the FCC's new Order. *See id.; see also* Jamilah King, *GOP Votes to Prevent FCC Funding for New Open Web Rules*, COLORLINES: NEWS FOR ACTION (Feb. 17, 2011), http://colorlines.com/archives/2011/02/gop_attacks_open_web_rules.html.

[56] King, *supra* note 55 ("Forty GOP Senators, led by Senate Commerce Committee . . . member Kay Bailey Hutchinson filed a resolution to terminate funding for the FCC's rules altogether" under the Congressional Review Act, "which allows Congress to overturn regulations passed by federal agencies.").

[57] Kang, *supra* note 54. Congressional measures by GOP have followed the "solution in search of a problem" rationale.

[58] Tim Wu, *The Broadband Debate, A User's Guide*, 3 J. ON TELECOMM. & HIGH TECH. L. 69, 69 (2004).

[59] Tiered networks, also known as a two-tier Web, refer to the idea that, rather than companies providing Internet service treating all sources of data equally, these companies could instead "give preferential treatment to content providers who pay for faster transmission, or to their own content." *See Net Neutrality*, NEW YORK TIMES: TOPICS, *supra* note 13.

[60] King, *supra* note 55 (quoting Rep. Anna Eshoo in the *Wall Street Journal*).

and issues with implementation and application.[61]

Deregulationists also argue that the FCC lacks the authority to regulate broadband service providers. As stated by Rep. Greg Walden (R-Ore.) in a hearing before the House on February 16, 2011, "[i]f left unchallenged, [the FCC's] claim of authority would allow the FCC to regulate any matter it discussed in the national broadband plan."[62] In her dissent, commissioner Baker cites the D.C. Circuit Court's ruling in *Comcast Corp. v. FCC*, which held that the FCC did not have authority under the Communications Act to prohibit Comcast from restricting the transfer of P2P connections.[63] Deregulationists further caution against the new regulatory costs which will ensue, as well as the "distortive effect of government micromanagement of broadband networks."[64]

III. FCC AUTHORITY OVER THE INTERNET AND BROADBAND ACCESS PROVIDERS

A. *Authority Under Communications Act of 1934*

The Federal Communications Commission was established by the Communications Act of 1934, which charged it with "regulating interstate and foreign commerce in communication by

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[61] Baker Dissent, *supra* note 52 ("Preserving the open Internet is . . . a bedrock principle shared by all in the Internet economy, [but since] the Internet is open today . . . government action is not necessary to preserve it."); *see also* Comcast Corp v. FCC, 600 F.3d 642 (D.C. Cir. 2010); King, *supra* note 55. Congressional GOP members generally follow this school of thought. Following two Congressional hearings in which all five members of the FCC were grilled by Republican lawmakers, Representative Fred Upton (R-Mich.) made a statement that during this hearing the commissioners were not able to "provide sufficient evidence of a crisis that warrants government intervention" and that "[t]he controversial Internet regulations stifle innovation, investment and jobs." *Id.* (quoting Rep. Fred Upton).

[62] Press Release, *Communications and Technology Republicans Stand Up for Jobs and Innovation, Fight Government Takeover of the Internet*, HOUSE ENERGY & COMMERCE COMMITTEE (Feb. 16, 2011) *available at* http://energycommerce.house.gov/News/PRArticle.aspx?NewsID=8239 ("Recall that the FCC concluded that consumers' concerns over privacy are deterring broadband. Does that mean the FCC can regulate Internet privacy?").

[63] Baker Dissent, *supra* note 52.

[64] *Id.*

wire and radio."[65] The Telecommunications Act of 1996 amended the 1934 Act by deregulating some sectors of the telecommunications industry, including local and long distance telephone services, cable television, and equipment manufacturing, opening them up to competition and changing regulations affecting both radio and television.[66] Neither the 1934 Act nor the 1996 Act considers broadband access service which emerged during the late 1990s. In the Order the Commission states that it is implementing "specific statutory mandates in the Communications Act [of 1934] and the Telecommunications Act of 1996."[67] However, these claims have been seriously contested.[68]

The classification of broadband access service is essential to determining the amount and extent of the FCC's authority to

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[65] 47 U.S.C. § 151 (2006) states:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission,' which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Id.

[66] Telecommunications Act of 1934, 47 U.S.C. § 151 (2006); *see also* Deonne L. Bruning, *The Telecommunications Act of 1996: The Challenge of Competition*, 30 CREIGHTON L. REV. 1255, 1256 (1997) (describing the Act as a "legislative trifecta" with three principles: "(1) to promote competition and reduce regulation to secure lower prices and higher quality services for American telecommunication consumers, (2) to encourage the rapid deployment of new telecommunications technologies, and (3) to implement policies that will prevent harm to [the] consumer[] from the implementation of competition.").

[67] Open Internet Report and Order, *supra* note 8, at 9.

[68] *See e.g.,* Jim Chen, *The Authority to Regulate Broadband Internet Access Over Cable*, 16 BERKLEY TECH. L.J. 677 (2001).

regulate it.[69] There are three essential regulatory definitions under the Communications Act, which each have different regulatory consequences.[70] "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[71] "Cable service" is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[72] "Information service" is defined as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[73] A telecommunications service is regulated as a common carrier, while a cable service provider cannot be regulated as such,[74] and an information service is a "conscious regulatory classification under the statute."[75]

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[69] *In re* Inquiry Concerning High-Speed Access on the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, 17 FCC Rcd. 4798 (Mar. 14, 2002) (separate statement of Michael K. Powell) [hereinafter Statement of Michael K. Powell].

[70] *Id.* at 34, 60. (stating that the three essential regulatory classifications are telecommunications service, information service, and cable service).

[71] 47 U.S.C. § 153(53) (2006).

[72] *Id.* at § 522.

[73] *Id.* at § 153(20).

[74] *Id.* at § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.").

[75] Statement of Michael K. Powell, *supra* note 69; *see also In re* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, 17 FCC Rcd. 4798, 4802 (2002) [hereinafter 2002 Inquiry Concerning High-Speed Access] (concluding that "cable modem service, as it [was] currently offered, [was] properly classified as an interstate information service, not as a cable service" and "initiat[ing] a rulemaking proceeding to determine

To support its authority over broadband access providers, the FCC has cited its role as a regulator of communications via radio, television, wire, satellite, and cable as evidence of its authority to regulate broadband service providers.[76] However, this "ancillary jurisdiction"[77] argument was struck down by the D.C. Circuit Court of Appeals in April of 2010.[78] In 2002, former FCC Chairman Michael K. Powell ruled that cable Internet service was neither a "telecommunications service" covered by Title II[79] nor a "cable

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the scope of the Commission's jurisdiction to regulate cable modem service and whether it should be regulated under the law").

[76] Open Internet Report and Order, *supra* note 8, at ¶ 115; *see also About the FCC,* FED. COMMC'NS COMM'N, http://www.fcc.gov/aboutus.html (last updated Sept. 22, 2010).

[77] The U.S. Supreme Court has recognized that the FCC has ancillary jurisdiction over subject matter that it has not been expressly granted authority over. *See* United States v. Sw. Cable Co., 392 U.S. 157, 167 (1968) (finding in the absence of compelling evidence, it was Congress' intention to prohibit the FCC from regulating community antenna television (CATV) systems, and the Commission's authority under § 152(a) of the Communications Act of 1934 (47 U.S.C. § 152(a)) over "all interstate . . . communication by wire or radio," permits the regulation of CATV systems, although such authority to regulate CATV "is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting"); United States v. Midwest Video Corp., 406 U.S. 649, 662 (1972) (finding FCC regulation requiring cable systems to operate as local outlets by cablecasting was "reasonably ancillary to the effective performance of [Midwest Video Corp.'s] responsibilities" because the regulation increased the number of outlets for community self-expression and enhanced the choice of programs and types of services available to the public.); FCC v. Midwest Video Corp, 440 U.S. 689, 691 (1979) (finding FCC rules "requiring cable television systems that ha[d] 3,500 or more subscriber and carr[ied] broadcast signals to develop at a minimum a 20-channel capacity by 1986, . . . [were] not reasonably ancillary to the [FCC's] responsibilities for the regulation of television broadcasting and ran counter to the statutory command that broadcasters themselves may not be treated as common carriers") (quoting United States v. Sw. Cable Co., 392 U.S. at 178).

[78] Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010) ("FCC failed to justify exercise of ancillary authority to regulate Internet service provider's network management practices.").

[79] Communications Act of 1934, *supra* note 6. Title II of the Communications Act of 1934 pertains to common carriers, which are defined in Title I Sec. 3:

> "The term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by

service" covered by Title VI of the Communications Act.[80] The Commission concluded that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[81]

In April of 2010, the Court of Appeals for the District of Columbia found the FCC did not have authority to regulate cable Internet service under section 4(i) of Title I of the Communications Act of 1934,[82] which states that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions."[83] The Court of Appeals for the District of Columbia ruled "the FCC could not rely on [its] 'ancillary jurisdiction' to regulate how Comcast managed its network."[84]

The FCC relies heavily on language from the

> wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is engaged, be deemed a common carrier."

Id. The term "telecommunications service" is defined in Title 1 Sec. 3 to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* The term "'cable service' means (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." *Id.*

[80] *Comcast*, 600 F.3d at 645 (citing 2002 Inquiry Concerning High-Speed Access, *supra* note 75 at ¶ 7).

[81] *In re* Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, *Notice of Proposed Rulemaking*, 17 FCC Rcd. 3019, 3022–25 (2002).

[82] *Comcast*, 600 F.3d at 661 ("[T]he allowance of wide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statute fails to confer . . . Commission authority.").

[83] *Id.* at 645; 47 U.S.C. § 154(i) (2006).

[84] Phil Goldstein, *2010 Year in Review: Net neutrality debate centers on wireless*, FIERCEWIRELESS (Dec. 23, 2010, 7:39 AM), http://www.fiercewireless.com/story/2010-year-review-net-neutrality-debate-centers-wireless/2010-12-23. *See, e.g., Comcast*, 600 F.3d at 646 (stating that FCC was unable to cite any specific delegation by Congress for it to regulate Comcast, and instead relied on "ancillary jurisdiction" citing the general jurisdictional grant of Title I which the Court found had not been met).

Telecommunications Act of 1996 to support its authority to impose the Order and regulate broadband access service.[85] Overall, the Telecommunications Act pays very little attention to the Internet; however, section 706(a), which is frequently cited by the FCC, states in large part that "[t]he Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . ."[86] Section 706(b) directs the FCC to conduct inquiries concerning the availability of such capabilities to all Americans and if the Commission should find that such capability is not being deployed, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[87] Section 706(d)[88] goes on to define "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."[89] In July, 2010, the FCC made a finding that broadband capabilities were not available to all Americans in a timely and reasonable manner and that action was therefore required.[90]

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[85] Open Internet Report and Order, *supra* note 8.

[86] 47 U.S.C. § 1302(a) (2006).

[87] *Id.* at § 1302(b); *FCC News Release, supra* note 10.

[88] Section 706 is not part of the Communications Act of 1934 such that:

> [in] adopting the rule against unreasonable discrimination, [the FCC relies] in part, on [its] authority under section 706 . . . [because] even if the rule against unreasonable discrimination were interpreted to require common carriage in a particular case, that result would not run afoul of section 3(51) [of the Communications Act] because a network operator would be treated as a common carrier pursuant to section 706, not "under" the Communications Act.

Open Internet Report and Order, *supra* note 8, at 17951.

[89] 47 U.S.C. § 1302(d) (2006).

[90] *In re* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, Sixth Broadband Deployment Report, 25 F.C.C. Rcd. 9556 (2010) [hereinafter 2010 Inquiry Concerning Deployment of Advanced

B. *Chairman Genachowski's "Third-Way" Approach*

Chariman Julius Genachowski has responded to the Court's ruling in *Comcast v. FCC* by suggesting re-classifying broadband as a type of hybrid utility[91] under Title II of the Communications Act, which authorizes the FCC to oversee telecommunications.[92] Despite the Commission's 2002 ruling in *In re High-Speed Access*[93] that cable modem service was neither a "telecommunications service" under Title II nor a "cable service" under Title VI, this third-way appears sufficient to support a finding of authority.[94] This is because the hybrid utility classification does not rely solely on a finding that broadband access providers are a "telecommunications service" or a "cable service," but that broadband providers are a composite of these services.[95]

The Order validates the Commission's authority under Section 706, Title II, Title III, and Title VI, finding that, read together, broadband providers are a hybrid-utility and are thus within the

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Telecommunications].

[91] *Julius Genachowski*, THE NEW YORK TIMES: TIMES TOPICS, PEOPLE (May 6, 2010), http://topics.nytimes.com/top/reference/timestopics/people/g/julius_genachowski/index.html. Chairman Genachowski asserts that broadband should be considered as "a sort of hybrid between an information service and a utility," which the FCC has authority to regulate under Title II. *Id.*

[92] Katie Bacon, *Bandwidth: Regulating digital communications is like trying to control an explosion, FCC Chairman Julius Genachowski '91 brings a full spectrum of skills to the job*, HARV. LAW BULL., Winter 2011, *available at* http://www.law.harvard.edu/news/bulletin/2011/winter/feature_2.php; FCC News Release, *supra* note 10 ("Title II of the Communications Act protects competition and consumers of telecommunications services. Over-the-top Internet voice services—VoIP—can develop as a competitor to traditional phone services. The FCC likewise safeguards interconnection between telephone customers and VoIP users.").

[93] 2002 Inquiry Concerning High-Speed Access, *supra* note 75, at 4802–7.

[94] *Id.* at 4832 (clarifying that cable modem service as an "interstate information service" by finding that "traffic bound for information service provides (including Internet access traffic) often has an interstate component" and that since it "is properly classified as interstate it falls under the Commission's . . . jurisdiction" which "rests on an end-to-end analysis").

[95] *Genachowski*, *supra* note 91.

jurisdiction of the FCC.[96] The FCC cites its duty to ensure the availability of advanced telecommunications capabilities to all Americans,[97] duty to protect competition and consumers of telecommunications services,[98] authority to license spectrum used to provide fixed and mobile wireless services,[99] and authority to protect competition in video services.[100] It is on this rationale that the Order primarily validates its authority.[101]

In a January 25, 2011 address to the Senate floor, United States Senator Maria Cantwell reminded the Senate that "the 'Chevron deference' courts give agencies is rather broad," and the FCC's Order certainly falls within its authority.[102] Senator Cantwell further stated that the FCC had not gone far enough since the rules

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[96] *FCC News Release*, *supra* note 10.

[97] 47 U.S.C. § 157 (2006); *see* FCC News Release, *supra* note 10. .

[98] Communications Act of 1934, Pub. L. No. 416, ch. 652, Title II, 48 Stat. 1064, 1070–81 (codified as amended at 47 U.S.C. §§ 201–276 (2006)); *see* FCC News Release, *supra* note 10.

[99] Communications Act of 1934, Pub. L. No. 416, ch. 652, Title III, 48 Stat. 1064, 1081 (codified as amended at 47 U.S.C. §§ 301–399(b) (2006)); *see* FCC News Release, *supra* note 10.

[100] Communications Act of 1934, Pub. L. No. 416, ch. 652, Title VI, 48 Stat. 1064, 1101 (codified as amended at 47 U.S.C. §§ 601–615(b) (2006)), In order to protect competition in video services, Title VI states:

> Internet video distribution is increasingly important to video competition. A cable or telephone company's interference with the online transmission of programming by Direct Broadcast Satellite operators or stand-alone online video programming aggregators that may function as competitive alternatives to traditional Multichannel Video Programming Distributors would frustrate Congress's stated goals in enacting Section 628 of the [Communications] Act, which include promoting competition and diversity in the multichannel video programming market.

FCC News Release, *supra* note 10.

[101] FCC News Release, *supra* note 10 (citing to Titles II, III, and VI of the Communications Act).

[102] 157 CONG. REC. S182 (daily ed. Jan. 25, 2011) (statement of Sen. Maria Cantwell) ("I consider the Commission's actions to be completely within the bounds of its authority. The Chevron deference courts give agencies is rather broad. A quick read of the 2005 U.S. Supreme Court's Brand X decision tells you all you need to know.").

did not extend completely to mobile broadband.[103]

In regards to the Order, the FCC has classified two general types of broadband: fixed and mobile. Fixed broadband implements high speed data transmissions using technologies such as T1, cable, DSL and FiOS.[104] Mobile broadband connects cellular telephones and travelling laptop computers using the cellular data market, which is a mobile market and often operates at speeds significantly less than fixed broadband.[105] The Commission reasons that since mobile broadband is in its earlier stages as compared to fixed broadband, it has decided to take "measured steps" to fully regulate mobile broadband in the same way as fixed broadband after "closely monitor[ing] [its] development."[106] The Commission considers that "most mobile providers offer[] Internet access only via 'walled gardens' or stripped down websites," that most "mobile networks present operational constraints that fixed broadband networks do not typically encounter," and that "[users] have more options for

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[103] *Id.* (stating "with the rollout of 4-G wireless services, that future is with us now").

[104] *See generally* Jim Chen, *The Authority to Regulate Broadband Internet Access over Cable*, 16 BERKELEY TECH. L. J. 677 (2001); Open Internet Report and Order, *supra* note 8. The FCC defines "'fixed broadband Internet access service' as a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment, such as the modem that connects an end user's home router, computer, or other Internet access device to the network." *Id.* at 49.

[105] Richard S. Whitt, *Evolving Broadband Policy: Taking Adaptive Stances to Foster Optimal Internet Platforms*, 17 COMMLAW CONSPECTUS 417, 462 (2009) ("It is not obvious how today's mobile wireless services can compete with wireline competitors on price, quality, and delivery speeds. . . . New entrants [in the mobile wireless marketplace] may have limited impact due to restraints on available spectrum, limitations of the technology and the difficulty of competing . . . ."). However, Whitt goes on to note that the two "largest national wireless high speed Internet providers—and perhaps best-situated potential competitors—" are AT&T and Verizon Wireless, "two incumbents from the wireline market." *Id. See also* Open Internet Report and Order, *supra* note 8. The FCC defines "'mobile broadband Internet access service' as a broadband Internet access service that serves end users primarily using mobile stations." *Id.* at ¶ 49.

[106] Open Internet Report and Order, *supra* note 8, at ¶ 8.

mobile broadband than for fixed . . . broadband."[107]

Verizon Wireless has already filed a motion to challenge the FCC's authority to impose its Order.[108] The challenge asserts that the FCC has overstepped its boundaries and does not have authority under the Communications Act of 1934 to regulate broadband service providers.[109] Several members of Congress have applauded the move by Verizon as "a check on an FCC that is acting beyond the authority granted to it by Congress."[110] The opposition of the Order by a majority of the Republican members in Congress will pose a challenge to the Order's implementation as well as signal a lack of Congressional approval. However, it does not appear this will impede the implementation of the Order since it is supported by the majority of the Democratic members of Congress as well as President Obama.[111]

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[107] *Id.* at ¶¶ 93–95.

[108] News Release, Verizon, Verizon Files Appeal in Federal Court Regarding FCC Net Neutrality Order (Jan. 20, 2011), *available at* http://newscenter.verizon.com/press-releases/verizon/2011/verizon-files-appeal-in.html.

[109] *Id.* (Michael E. Glover, Verizon senior vice president and deputy general counsel, stated, "We believe [the FCC's assertion of broad authority for sweeping new regulation] goes well beyond any authority provided by Congress, and creates uncertainty for the communications industry, innovators, investors and consumers.").

[110] Press Release, Fred Upton, Upton, Walden, Terry Praise Verizon's Court Challenge to FCC Net Neutrality Power Grab (Jan. 20, 2011), *available at* http://upton.house.gov/News/DocumentSingle.aspx?DocumentID=220774.

[111] To be overturned by the Congressional Review Act, both the Senate and the House of Representatives would have to overturn the Order and it would have to be approved by President Barack Obama without a veto. President Obama has made his support of network neutrality well known through his support of the Save The Internet Coalition, his support of network neutrality during his campaign for presidency, as well as a statement "congratulat[ing] the FCC and Genachowski and promis[ing] to continue to fight to make sure the democratic spirit of the Internet remains intact." Christopher Weber, *FCC Approves Net Neutrality Rules, A Victory for Obama*, POLITICS DAILY (Dec. 21, 2010), http://www.politicsdaily.com/2010/12/21/fcc-approves-net-neutrality-rules-a-victory-for-obama/. *See also* Press Release, The White House, Statement by the President on Today's FCC Vote on Net Neutrality (Dec. 21, 2010), *available at* http://www.whitehouse.gove/the-press-office/2010/12/21/statement-president-today-s-fcc-vote-net-neutrality.

IV. THE FCC'S ORDER: TRANSPARENCY, NO BLOCKING, AND NO UNREASONABLE DISCRIMINATION

On December 21, 2010, the FCC released an Order stating it will "preserve the Internet as an open network, enabling consumer choice, freedom of expression, user control, competition, and the freedom to innovate."[112] The Order aims to accomplish this by implementing three simple rules: first, all broadband access providers must afford full disclosure to the public; second, fixed broadband access providers may not block any legal content; and third, fixed broadband access providers may not discriminate in the transfer rate of any legal content.[113] The rules promulgated in the Order become "effective [sixty] days after the date of Federal Register notice announcing the decision of the Office of Management and Budget regarding approval of the information collection requirements."[114]

The Commission likened broadband providers to "Internet gatekeepers"[115] and the three rules are intended to regulate broadband providers' capabilities "to ensure the continued openness of the Internet against powerful gatekeeper control."[116] In his concurring statement, Commissioner Michael J. Copps applauds the Order as a needed measure to ensure that "gigantic corporations—in many cases, monopoly or duopoly broadband Internet access service providers—[cannot] exercise unfettered

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[112] FCC News Release, *supra* note 10.

[113] *Id.*

[114] Open Internet Report and Order, *supra* note 8, at ¶ 161.

[115] *Id.* at ¶ 24. (stating "broadband providers may have incentives to increase revenues by charging edge providers, who already pay for their own connections to the Internet for access or prioritized access to end users); *Id.* at 66 (indicating gatekeepers are also known as a "terminating monopolist."); *see, e.g.,* CCIA Comments at 7; Skype Comments at 10–11; Vonage Comments at 9–10; Google Reply at 8–14. "A broadband provider can act as a gatekeeper even if some edge providers would have bargaining power in negotiations with broadband providers over access or prioritization fees." Open Internet Report and Order, *supra* note 8, at ¶ 24.

[116] Concurring Statement of Commissioner Michael J. Copps, FCC Acts to Preserve Internet Freedom and Openness (Dec. 23, 2010) [hereinafter Copps Concurrence] *available at* http://www.fcc.gov/Daily_Releases/Daily_Business/2010/db1223/FCC-10-201A3.pdf.

control over Americans' access to the Internet."[117] Copps lauds the Order as necessary to protect technological innovation and economic growth as well as free speech and the "future of our democracy."[118]

A. *The Three Rules*

The Order applies to both fixed broadband providers as well as to mobile network providers, though in a much more limited sense.[119] The first rule[120] of the Order requires transparency through public disclosure of accurate information regarding the network management practices, performance, and commercial terms of each company's services.[121] The central purpose of this transparency requirement is to promote competition which in turn, the FCC states, will drive "innovation, investment, end user choice, and broadband adoption."[122] Consumers will be able to make informed choices about their broadband provider, and the openness will help improve "confidence in broadband providers . . . ."[123] The FCC also believes this requirement will help to ensure that broadband providers are abiding by the open Internet principles.

The second rule mandates a no blocking policy, which prohibits *fixed broadband providers* from blocking "lawful

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[117] *Id.*

[118] *Id.*

[119] Open Internet Report and Order, *supra* note 8, at ¶ 1 (stating that mobile broadband providers are only subject to the disclosure requirement under rule 1 and under rule 2 are only prohibited from blocking "lawful websites, or . . . applications that compete with their voice or video telephony services" subject to reasonable network management, rather than the broader prohibition against blocking any legal content as rule 2 applies to fixed broadband providers).

[120] *Id.* ("Transparency. Fixed and mobile broadband providers must disclose the network management practices, performance characteristics, and terms and conditions of their broadband services.").

[121] *Id.* at ¶ 55("[T]he rule does not require public disclosure of competitively sensitive information that would compromise network security or undermines the efficacy of reasonable network management practices.").

[122] *Id.* at ¶ 53.

[123] *Id.*

content, applications, services, or non-harmful devices"[124] subject to reasonable network management, and it prohibits mobile broadband providers.[125] The third rule applies only to fixed broadband providers and it prohibits them from unreasonably discriminating in the transmission of any lawful network traffic over a consumer's broadband Internet access service, but stipulates that reasonable network management shall not constitute unreasonable discrimination.[126] This rule has absolutely no impact on mobile broadband access providers.

The Order indicates that it is the intention of the Commission to examine the progress of the mobile broadband industry and potentially subject it to the same anti-blocking and anti-discrimination restrictions.[127] However, it seems that with the advent of the 4G system, mobile broadband is already "catching up to speed."[128]

B. *Effect of the Order*

The Order is intended to directly affect broadband providers in order to protect consumers,[129] spur technological innovation and economic growth, and ensure the free and open character of the

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[124] Open Internet Report and Order, *supra* note 8, at ¶ 63.

[125] *Id.* at ¶ 1 ("No blocking. Fixed broadband providers may not block lawful content, applications, services, or non-harmful devices; mobile broadband providers may not block lawful websites, or block applications that compete with their voice or video telephony services").

[126] *Id.* ("No unreasonable discrimination. Fixed broadband providers may not unreasonably discriminate in transmitting lawful network traffic.").

[127] *Id.* at ¶¶ 93–95.

[128] Marguerite Reardon, *Can 4G Wireless Take on Traditional Broadband*, CNET REVIEWS, (Mar. 22, 2010, 4:00 AM), http://reviews.cnet.com/8301-12261_7-20000832-10356022.html (arguing that 4G wireless could replace traditional cable and DSL broadband) The 4G network offers average download speeds between 3 Mbps and 6 Mbps, which is comparable to most cable and DSL fixed broadband speeds, showing "spectrum of broadband options" with AT&T DSL running between 768 Kbps and 6Mbps, while others run up to 50Mbps (Verizon Fios, Time Warner Cable, Cox, Comcast). *Id.*

[129] Open Internet Report and Order, *supra* note 8 (stating that transparency will allow consumers to make informed choices regarding use of such services; anti-blocking and anti-discrimination rules will ensure that consumers have access to lawful websites).

Internet.[130] This is no short order, and the ability of the FCC's new rules to accomplish this is met with some serious debate. Indeed, the five Commissioners[131] have unanimously held that technological innovation and consumer protection are the duty of the FCC.[132] However, their statements following the release of the Order outline the controversy even on an inter-agency level.

1. *Rule 1: Transparency*

In regards to the transparency requirement, some commenters argue that a disclosure rule imposes significant burdens on broadband providers.[133] The Commission alleges that it will only require one disclosure, however it seems that information regarding ISPs' network practices, which include how they manage congestion, application of specific protocols, device attachment rules and security, as well as performance characteristics and commercial terms such as privacy and pricing are subject to change periodically.[134] The Commission responds that no commenter has cited any source of increased costs or possible estimates.[135] However, the cost of compiling this data in accordance with the Commission's rule, as well as distributing it either electronically or in hard copy to consumers and possible consumers could certainly entail additional costs. This rule will also require costs related to policy drafting, oversight, and enforcement of the required disclosures.

2. *Rules 2 and 3: Reasonable Network Management*

The anti-blocking and anti-discrimination rules can be looked at jointly in the sense that on their face they appear to prohibit any restriction or limitation absent "reasonable network management"

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[130] *See* Copps Concurrence, *supra* note 116.

[131] The Federal Communications Commission is comprised of five commissioners: Chairman Julius Genachowski, Commissioner Michael J. Copps, Commissioner Robert M. McDowell, Commissioner Mignon Clyburn, and Commissioner Meredith Atwell Baker. *FCC Commissioners*, FEDERAL COMMC'NS COMM'N, (Nov. 04, 2009), http://www.fcc.gov/commissioners/.

[132] FCC News Release, *supra* note 10.

[133] Open Internet Report and Order, *supra* note 8, at ¶ 59.

[134] For a list of what is required for disclosure, *see, e.g.*, *id.* at ¶ 56.

[135] *Id.*

justifications.[136] The impact of these rules relies entirely on what is meant by the phrase, "subject to reasonable network management."[137] In its News Release, the FCC defines "reasonable network management" as any practice that is "appropriate and tailored to achieving a *legitimate network management purpose*."[138] This includes: "ensuring network security and integrity, including . . . traffic that is harmful to the network, traffic that is unwanted by users, . . . and by reducing or mitigating the effects of congestion on the network."[139] Depending on how this language is interpreted, it seems that broadband providers would have a good argument for charging their subscribers for different tiers of service[140] or charging based on bandwidth consumed.[141] Consider, for example, that YouTube congested Comcast's network due to the large volume of bandwidth it consumes.[142] Comcast could argue that slowing the transfer rate or blocking YouTube entirely was for purposes of "reasonable network management." It appears this added reasonableness clause allows for just such a restriction, and if litigation commences, the courts would have to weigh the overall strains on the broadband provider's network against any other possible discriminatory factors in favor of blocking or adjusting transfer rate. The reasonableness clause appears to answer many opponents' charges that broadband providers would be unreasonably restricted from acting in good faith to keep their networks clear and operating, as well as their ability to charge different rates based on bandwidth consumed.[143]

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[136] *Id.* at ¶ 11.

[137] *Id.*

[138] FCC News Release, *supra* note 10 (emphasis added).

[139] *Id.*

[140] The idea that companies could instead give preferential treatment to content providers who pay for faster transmission to their own content, creating a tiered network. *See Net Neutrality*, NEW YORK TIMES: TOPICS, *supra* note 13.

[141] Open Internet Report and Order, *supra* note 8, at ¶ 72.

[142] YouTube streams 75 petabytes (a petabyte is one quadrillion bytes) every three months, which is roughly the same amount as all the world's radios, cable and broadcast televisions stream in one year. Bret Swanson, *The Coming Exaflood*, WALL ST. J. (Jan. 20, 2007), http://online.wsj.com/article/SB116925820512582318.html.

[143] Open Internet Report and Order, *supra* note 8, at ¶ 72 (prohibiting

3. *Fixed v. Mobile Broadband Differences Falls Short of Market Practices*

It does not appear that the Order will have a major impact on Americans' current Internet use. Indeed the intent is that the consumers' current situation be maintained.[144] Perhaps a few consumers will be more enlightened by the required disclosures; however, from a practical standpoint, few will base their decision to use one broadband provider over another on that provider's device attachment rules. This is especially likely since the market has created so few options for consumers.[145] It appears that the arguments about the impact of the disclosure requirements on consumer decision making and confidence are at least somewhat exaggerated. The anti-blocking and anti-discrimination provisions, however, could have more direct and immediate impacts on consumers. If broadband providers are currently engaged in blocking and restricting the transfer rate to a degree that has limited consumers' access, then the new rules may. However, as stated above in Part II, there is very little indication that such a practice exists.[146]

Commissioner Baker argues in her dissent that the Order does not provide for any regulatory certainty, perhaps indicating the potential impact of the reasonableness clause.[147] Baker also cites the open-ended review of the Order as evidence of its future

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broadband providers from charging for different tiers of service and instead "requiring all subscribers to pay the same amount for broadband service, regardless of the performance or usage of the service, would force lighter end users of the network to subsidize heavier end users. It would also foreclose practices that may appropriately align incentives to encourage efficient use of networks.").

[144] FCC News Release, *supra* note 10.

[145] Nuechterlein, *Antitrust Oversight of an Antitrust Dispute*, *supra* note 12.

[146] *See supra* Part II.

[147] Baker Dissent, *supra* note 52, at 3 (finding fault with the majority's suggestion that the Order is premised on providing regulatory certainty, citing the avoidance of defining key terms, questioning but not banning practices, couching decision as "at this time" repeatedly, and inviting both case-by-case complaints and declaratory rulings; she states that the Order is "in too many ways . . . a first step, not a last step").

uncertainty.[148] She argues that "consumers will not benefit from net neutrality," and that the Order is focused instead on "promoting the edge—Internet applications and services—over networks and consumers."[149] She goes on to argue that possible cost increases could have a negative long-term effect on consumers if their rates are increased to offset new costs to broadband providers.

The Order has a direct impact, first and foremost, on broadband Internet access service, which encompasses both fixed and mobile broadband providers.[150] This creates a major discrepancy within the stated aims of the Order, which focused mainly on fixed broadband pipes, leaving rules about operating mobile broadband networks largely up to interpretation.[151] Both will be held to the transparency rule, but the anti-blocking and anti-discrimination rules are not subject to interpretation as far as mobile broadband is concerned. Joanie Wexler, an expert in the networking technology industry, noted that mobile operators are allowed to block voice and video applications and services that compete with their own such as Skype, but their ability to disallow applications that do not directly compete with their core services is uncertain.[152] Mobile operators also have the ability to pick and choose what goes into their "app" stores,[153] which apparently gives them the authority to

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[148] *Id.* at 8. Commissioner Baker stated:

> [T]o promote regulatory certainty, this future proceeding [Order states that the FCC is to review all of the rules no later than two years from their effective date] should mirror the Commissions biennial review process under which its task is limited to determining whether any rule is no longer in the public interest as a result of meaningful competition.

Id.; *see* 47 U.S.C. § 161. (2006)

[149] Baker Dissent, *supra* note 52, at 5.

[150] FCC News Release, *supra* note 10 (broadband provider refers to "any service that the Commission finds to be providing a functional equivalent of [broadband Internet access service]").

[151] Joanie Wexler, *FCC Waffles Over Mobile/Wireless Network Neutrality*, NETWORK WORLD (Jan. 3, 2011, 9:58AM), http://www.networkworld.com/newsletters/wireless/2011/010311-wireless1-netneutrality.html.

[152] *Id.*

[153] An "app" store is a service for iOS devices (such as iPhone and iPod) which provide applications which users can browse and download to these devices. *See e.g.,* App Store, COMPUTER DICTIONARY, http://computer.yourdictionary.com/app-store.

block applications created by third parties which compete with their own. The Order directly intends to prohibit such a possibility through its "No Blocking" rule.[154]

Allowing the mobile industry to continue to operate in its own competitive broadband niche will create a foundation of discriminatory practices by these companies. Mobile operators will block the content, applications, and services of third parties in favor of their own. While this could potentially encourage competition in certain facets of the mobile broadband and services industry, it could also encourage some companies to monopolize specific areas of the industry, such as "apps,"[155] without investing in other services for users. The mobile industry has already exemplified itself as discriminatory in ways that fixed broadband has not even implied it would be willing to do. Laying this uncertain foundation will create a more difficult incorporation of mobile broadband in the future.[156] The reasonableness clause of Rule 2 and 3 would allow for accommodations to the relative "infancy" of the mobile broadband market. The Order should have included mobile broadband in its anti-blocking and anti-discrimination rules as well as the transparency requirement, because ultimately "the kind of Internet users get should not depend on whether they happen to access it via wireline or wireless connection."[157]

The FCC will also face trouble in implementing the Order.

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[154] Wexler, *supra* note 152. In their news release, the FCC states that this is due to the fact that most consumers have more choices for mobile broadband than for fixed broadband, which implies that the market will level the playing field, as well as the operational constraints that exist for mobile networks. FCC News Release, *supra* note 10.

[155] "Apps" refers to the applications which are available with most smart phones.

[156] The FCC intends to hold the mobile broadband industry to the same standards it has just put forth for the fixed broadband industry. Open Internet Report and Order, *supra* note 8, at ¶ 6.

[157] Statement of CDT Senior Policy Counsel David Sohn (quoted in Alex Howard, *What the New FCC Open Internet Rules Could Mean For Net Neutrality*, GOV20.GOVFRESH (Dec. 21, 2010), http://gov20.govfresh.com/what-the-new-fcc-open-internet-rules-could-mean-for-net-neutrality/.

The rules will not become effective for at least a few months,[158] during which time they will be subject to challenges from the Republican Congress and from private interests. The Republican majority of the House has already announced its intention to challenge the Order on several grounds, most notably whether the FCC possesses the authority to regulate ISPs or the Internet in the first place.[159] Indeed even the formal challenges by Verizon Communications Inc., and Metro PCS Communications Inc., to the same D.C. Circuit Court that ruled against FCC broadband regulation in the Comcast case will pose a major hurdle at the outset.[160]

V. CONCLUSION

The FCC's Order will place increased administrative costs on both the Government and broadband providers with little, if any, measurable impact in consumer protection, or technological innovation. While the Order is in response to possible threats, which have been realized in very small scale terms, their responses to these prior "incidents" has been criticized by the D.C. Circuit as beyond the scope of their authority. Furthermore, the rules apply disproportionately to two categories of broadband, allowing for mobile providers, who have shown higher incidents of discrimination to continue such practices as long as there is transparency in the form of public disclosure, while fixed provides are held to the higher anti-blocking and anti-discrimination rules. The FCC cites the infancy and inferiority of mobile broadband technology as a reason to adopt a policy of "wait and see." The resulting "network semi-neutrality" is thus an extension of the

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[158] The date is at this time still indefinite, the Order was released Dec. 23, 2011. Open Internet Report and Order, *supra* note 8.

[159] *Reaction to FCC's Network Neutrality*, BENTON FOUND. (Dec. 21, 2010, 5:35 PM), http://benton.org/node/46945 (noting that House Republicans have promised a "swift reaction . . . that could get off the ground as soon as January" and comments by Rep. Upton who charged that Congress must "use every available resource to halt the regulations").

[160] *See* Joelle Tessler, *Verizon Challenges FCC's Net Neutrality Rules: How Will The Internet Giant Fare*, HUFFINGTON POST (Jan. 20, 2011, 6:58 PM), http://www.huffingtonpost.com/2011/01/20/verizon-challenges-fcc-netneutrality-rules_n_811869.html.

status quo that the FCC claims to correct with the Order. The FCC has asserted authority over broadband Internet access providers and has dictated a strong need for regulation to prevent discrimination, yet it has sheepishly avoided regulating the entire broadband network. The Order, which purports openness and a free market, should apply equally to all providers of broadband Internet access.